

STATE OF WISCONSIN

CIRCUIT COURT
Branch 1

DANE COUNTY

PASTORI M. BALELE,

Petitioner,

RECEIVED

vs.

JUN - 1 2001

PERSONNEL COMMISSION

MEMORANDUM DECISION
AND ORDER
Case No. 00CV2876

WISCONSIN PERSONNEL COMMISSION and
WISCONSIN DEPARTMENT OF ADMINISTRATION,

Respondents.

ADMINISTRATIVE REVIEW

This matter is before the court on Petitioner Pastori M. Balele's request for judicial review of a decision by Respondent Personnel Commission (the Commission) granting summary judgment to and dismissing Balele's complaint against Respondent Department of Administration (DOA). Balele urges this court that the Commission erred in determining that DOA, by Secretary George Lightbourn, did not discriminate or retaliate against Balele when Lightbourn failed to consider Balele's application for a division administrator position.

DOA and the Commission contend that Balele did not meet his burden under *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), and *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 376 N.W. 2d 372 (Ct. App. 1985) to demonstrate a *prima facie* case of discrimination or retaliation. DOA further contends that because the position in question is unclassified, Lightbourn was not obligated to follow a merit recruitment process, and thus did not have to seek or consider anyone's application.

STANDARD OF REVIEW

Judicial review of administrative agency decisions is governed by Wis. Stat. §§ 227.52-227.57. Such review is strictly statutory; there is no common law counterpart. The court is bound by those statutory rules, and the case law interpreting them. Contrary to Balele's assertion, this court may not employ summary judgment procedure in deciding this review. *Wisconsin Environmental Decade, Inc. v. Public Service Commission*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (Ct. App. 1977). Judicial review under ch. 227 is summary in nature; there is no trial *de novo* of factual issues before the reviewing court. *Id.*

However, as occurred here, the Commission may dispose of a case before it without an evidentiary hearing in what is the functional equivalent of a summary judgment proceeding. *Balele v. Wisconsin Personnel Commission*, 223 Wis. 2d 739, 746-47, 589 N.W.2d 418 (Ct. App. 1998). In *Balele*, the court concluded that statutory authority for agencies to develop and implement summary disposition procedures is provided in Wis. Stat. § 227.42(1)(d).¹ Such summary disposition necessarily requires that there be no disputed issues of material fact. *Balele*, 223 Wis. 2d at 746.

Review under ch. 227 requires the court to evaluate and treat separately issues of agency procedure, the agency's interpretations of law, and its findings of fact. Wis. Stat. § 227.57(3). In the instant case, there are no allegations of agency procedural errors. Thus, this court's review will focus on the Commission's findings of fact and its interpretations of law.

¹Wis. Stat. § 227.42(1)(d) reads as follows:

Right to hearing. (1) In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contest case if:

(d) There is a dispute of material fact.

The reviewing court must sustain an agency's findings of fact if they are supported by substantial evidence in the record. Wis. Stat. § 227.57(6). *Hamilton v. DILHR*, 94 Wis. 2d 611, 617-18, 288 N.W.2d 857 (1980). Substantial evidence does not mean a preponderance of the evidence. *Id.*, at 617. Rather, substantial evidence is defined as relevant evidence that a reasonable person could accept as adequate to support the determination at issue. *Id.* Where the evidence is such that two conflicting conclusions may reasonably be drawn, it is for the agency to determine which view of the evidence it accepts. *Id.*

There are three levels of deference afforded to an agency's interpretation of law: great weight, due weight, and no weight. *Sauk County v. WERC*, 165 Wis. 2d 406, 413-14, 477 N.W.2d 267 (1991). The great weight standard of deference is appropriate when the court finds that the agency is charged with administering the law in question, the agency's interpretation is consistent with its previous interpretations of the law, the agency has specialized knowledge or expertise in interpreting the law, and the agency's interpretation provides uniformity of application of the law. *Knight v. LIRC*, 220 Wis. 2d 137, 148, 582 N.W.2d 448 (1998). When reviewing an agency decision under this standard, the court must uphold the agency if its interpretation is reasonable and not contrary to the clear meaning of the law. *Id.*

The court finds that the Commission's decision in this case is due great weight deference. The Legislature charged the Commission with receiving and processing discrimination complaints filed under Wisconsin's Fair Employment Act. Wis. Stat. §§ 111.375(2), 230.45(1)(b). The Commission has been deciding employment discrimination cases for at least a decade, and likely much longer. *See e.g., Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992). There is no allegation in this case that the

Commissions' decision is inconsistent with its prior decisions.

The Commission certainly has specialized knowledge and expertise where employment relations and discrimination laws are concerned, as those are the areas with which the Commission is charged and has been dealing since its inception. Based on all of these considerations, the court is persuaded that the Commission's legal conclusions are due great weight deference. Thus, the court must uphold the Commission's decision so long as it is reasonable and not against the clear meaning of the Fair Employment Act.

DECISION

Although the Commission decided this case by following a summary disposition procedure, the court must decide it upon the substantial evidence and great weight deference standards. However, if the court determined that there were material factual issues that would render the Commission's summary disposition invalid, the court would have to remand the case to the Commission for resolution of those issues. Wis. Stat. § 227.57(7). While Balele would have the court believe that the Commission rested its decision on an unresolved factual issue, the court finds otherwise.

Balele argues on review that the Commission erred in deciding that he had not satisfied all the elements of a *prima facie* case of discrimination due to its finding that Balele was not qualified for the position at issue.² Balele claims it was improper for the Commission to make

²The four elements comprising a *prima facie* case of discrimination are:

- 1) that the complainant is a member of a class protected by the Fair Employment Act;
- 2) that the complainant was qualified for a job for which the employer was seeking applicants;
- 3) that, despite the complainant's qualifications, he or she was rejected; and
- 4) that, after the rejection, the employer continued to seek applicants from persons of the complainant's qualifications.

McDonnell Douglas v. Green, 411 U.S. at 802, , and *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d at 173.

that finding because he contends his qualifications for the position were never in question. It is true that in the proceeding below, DOA did not specifically address the question of Balele's qualifications. However, it appears that, as Lightbourn believed he was not obligated to consider anyone's qualifications other than Cramer's, he never reached the question of whether Balele, or anyone else, was qualified for the position to which he appointed Cramer.

In any event, whether or not the parties agreed before the Commission that there were no disputed issues of material fact, the Commission would not have been bound by the parties' opinions. The Commission, as the factfinder, was charged with making that determination. Wis. Stat. § 230.44(1)(b), Wis. Admin. Code §§ PC 1.02(2). Here, the Commission determined, on the basis of the complaint and answer, the affidavits and other supporting documents, that there were no disputed issues of material facts. The Commission also determined, based on various evidentiary documents attached to both parties' motions for summary judgment, that Balele's experience and qualifications did not meet the level required for the position at issue.

The court defers to the Commission's specialized knowledge and expertise in the area of employment relations generally, and in assessing an interested person's qualifications for a given position specifically. The Commission's conclusion that Balele was not qualified for the position of division administrator for state agency services is supported by evidence in the record, and the court cannot say that it was unreasonable for the Commission to so conclude. Such evidence consists of a job description for the position and a copy of Balele's resume.

Having determined that Balele was not qualified for the position at issue, the Commission concluded that Balele had not met his burden to present a *prima facie* case of employment

discrimination or retaliation. The court finds that the Commission's conclusion was based on a factual determination that is supported by substantial evidence in the record, and that the Commission's application of the law as to differential treatment discrimination was reasonable and in accordance with the clear meaning of the law.

Even though it need not have, the Commission then addressed the question of whether Lightbourn's reasons for not considering Balele's interest in the position demonstrated pretext.³ The Commission agreed with DOA that Lightbourn was not obligated to engage in a formal competitive hiring process. Given that fact, it appears to the court that Balele failed to satisfy at least one other element of a *prima facie* case, i.e., that he was rejected after having been considered for the position. Lightbourn never considered Balele for the position. Accordingly, Lightbourn did not reject Balele. Lightbourn simply did not look farther than Cramer for the division administrator position, because he was aware of Cramer's superior qualifications and he had the authority to appoint someone well-qualified for the job.

The Commission further found that Lightbourn's stated reason for appointing Cramer, i.e., because of Cramer's outstanding qualifications, was legitimate and not discriminatory toward Balele. Thus, the Commission determined that, even if Balele had alleged a *prima facie* case, Lightbourn's reasons for not hiring Balele were not pretextual.

Balele also complained that the process followed by Lightbourn to fill the division administrator position has a disparate impact on minorities. In order to prove disparate impact, a complainant must show that a facially neutral employment policy has a disproportionate impact

³When a complainant has set forth a *prima facie* case of discrimination, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its action. *McDonnell Douglas v. Green*, 411 U.S. at 802. If the respondent discharges that burden, the complainant then must show that the respondent's reasons are pretextual, i.e., a cover for impermissible discriminatory intent. *Id.*, at 804.

on a protected group. *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720 (1977). The Commission identified Balele's allegation of Lightbourn's "pre-selecting" Cramer as the policy upon which Balele was basing his disparate impact theory.

The Commission found that there was no such policy, and thus, that Balele had not met his burden with respect to his complaint of disparate impact. The Commission based its finding on facts of record, i.e., first, that Lightbourn's general invitation to Cramer to notify him if Cramer were ever interested in returning to employment at DOA, had occurred well before Lightbourn received Balele's e-mail informing him that Balele was interested in the then-vacant division administrator position. The Commission viewed that fact as evidencing no intent on Lightbourn's part to discriminate against Balele.

The court finds that the Commission's conclusion in this regard is based on substantial evidence and is reasonable. The court also finds Balele's argument that he proved a pattern of "preselection" in state service based on a claim he made in his affidavit in support of his case before the Commission to be without merit. Balele appears to believe that his unsubstantiated opinion constitutes sufficient proof of his allegation, and that the fact that DOA did not specifically contest his opinion makes it a done deal. However, as the court stated earlier in this opinion, the Commission, as the factfinder below, was not bound by the parties' opinions, nor was it obligated to accept as true a claim for which there was no evidence in the record.

Balele's more forceful argument respecting disparate impact would be his allegation that there is an "underutilization" of minorities in the relevant job class at DOA as a result of the process Lightbourn follows to appoint those positions. However, Balele has not provided any evidence to support that contention.

In any event, the Commission found the allegation to be without merit for several reasons, most notably that the underutilization data Balele had alluded to did not apply to unclassified positions such as the one in question. Further, the Commission pointed to statistical data regarding the utilization of minorities in division administrator positions at DOA provided to it in DOA's supporting papers that directly refuted Balele's contention. Once again, the court concludes that the Commission's finding was based on substantial evidence in the record and was reasonable.

CONCLUSION

For all of the reasons cited herein, the court finds that the Commission did not abuse its discretion in affirming DOA Secretary Lightbourn's decision to hire Cramer for the division administrator of state agency services position. The court further finds that the Commission's findings of fact are supported by substantial evidence in the record, that the Commission properly found there were no genuine issues of material fact, and that its interpretations of law were eminently reasonable. Thus, the court affirms the Commission's decision.

IT IS SO ORDERED.

Dated this 21 day of May, 2001.

BY THE COURT:

A handwritten signature in cursive script, reading "Robert A. DeChambeau", written over a horizontal line.

**The Honorable Robert A. DeChambeau
Dane County Circuit Court Judge - Branch 1**